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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-803

CONNIE M. HOFFER, ET AL.,
Petitioners,

v.

ANTHONY DE CRESCENZO, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

ARNOLD, BEAUCHEMIN & HUBER, P.A.,
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December 2, 1975

The Daily Record Co., Baltimore, Md. 21202

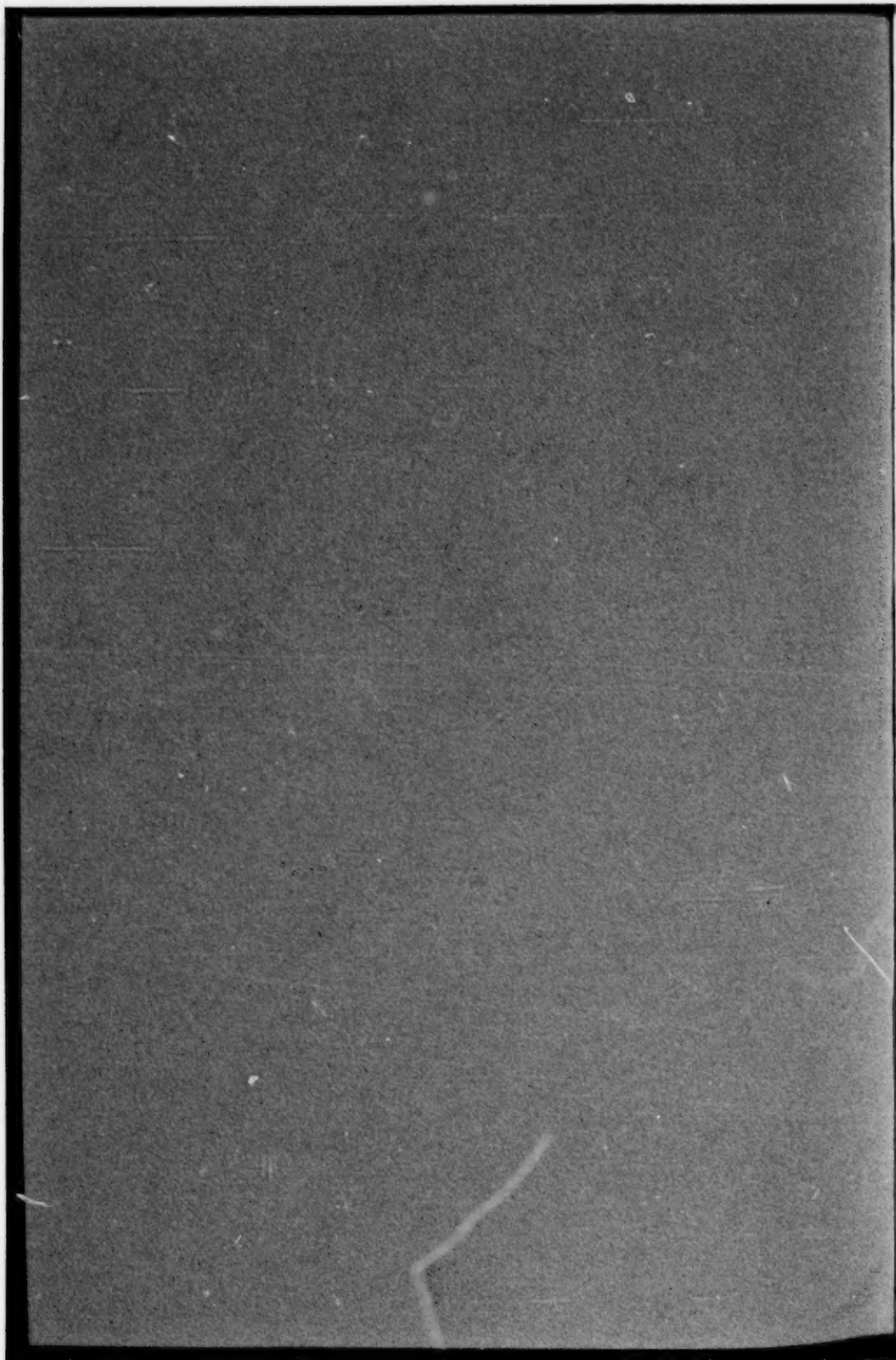

TABLE OF CONTENTS

	PAGE
OPINIONS BELOW	2
JURISDICTION	2
QUESTIONS PRESENTED	3
CONSTITUTIONAL PROVISIONS INVOLVED	3
STATUTORY PROVISIONS INVOLVED	4
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	12
APPENDIX A (Opinion of the Court of Special Appeals of Maryland and Order of Court of Maryland)	1a
APPENDIX B (Statutory Provisions)	7a

TABLE OF CITATIONS

Cases

Chase v. Jamison, 21 Md. App. 606, 320 A.2d 580.	6, 10
Ginnavan v. Silvertone, 246 Md. 500, 229 A.2d 124	8
Missouri v. Lewis, 101 U.S. 22, sub nom., Bowman v. Lewis, 25 C. Ed. 989	9
Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306	6
Salsburg v. Maryland, 346 U.S. 545	9

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

The Petitioner, Connie M. Hoffer, to her own use and to the use of Hartford Accident & Indemnity Company, prays that a Writ of Certiorari Issue to Review the Opinion and Judgment of the Court of Special Appeals

of the State of Maryland rendered in these proceedings on June 5, 1975, and the Order of the Court of Appeals of the State of Maryland denying Petitioner's Petition for Certiorari to that court dated September 8, 1975.

OPINIONS BELOW

The opinion of the Court of Special Appeals of the State of Maryland, reported in 338 A.2d 424, appears at Appendix A, *Infra,* pp. 1a-6a. The Court of Appeals of the State of Maryland denied Petitioner's Petition for a Writ of Certiorari to the Court of Special Appeals of the State of Maryland without opinion on the grounds that there had been no showing that review by Certiorari is desireable and in the public interest. The Order appears at Appendix A, *Infra,* pp. 6a-7a.

JURISDICTION

The Order of the Court of Appeals of the State of Maryland denying Petitioner's Petition for a Writ of Certiorari to the Court of Special Appeals of the State of Maryland was entered on September 8, 1975. This Petition for Certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257 (3).

QUESTIONS PRESENTED

The Superior Court of Baltimore City dismissed the pending civil action of Connie M. Hoffer under Rule 528L of the Supreme Bench of Baltimore City, a copy of which appears at Appendix B, *Infra,* pp. 19a-20a, for failure to reach trial within the time allowed by the Rule; the dismissal was affirmed by the Maryland Court of Special Appeals and Certiorari was denied by the Maryland Court of Appeals. The questions thereby arising are:

1. Whether the dismissal of a civil suit pursuant to the terms of a local rule of court of Baltimore City, on grounds that the case did not come to trial within the period of time specified by the rule, without allowing a hearing to the Plaintiff to demonstrate her good faith efforts to prosecute her case, and without allowing the trial court to exercise its judicial discretion in determining whether the action ought to be dismissed, constitutes a deprivation of the property of the Plaintiff without due process of law in violation of the Due Process Clause of the XIVth Amendment.

2. Whether a local rule of court of Baltimore City requiring dismissal of a cause of action, if it has not come to trial within a specified period of time, with no hearing available to the Plaintiff and no discretionary power in the trial court to suspend the operation of the rule, constitutes a denial of equal protection of the laws to litigants who must file their suits in Baltimore City, where the rule in question conflicts with the corresponding rule in the Maryland Rules of Procedure, which allows the trial court to exercise its judicial discretion, is applicable state-wide and was promulgated by the Maryland Court of Appeals under the express authority of the Constitution of the State of Maryland.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendment XIV, Sec. 1:

> No state shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Maryland, Art. IV, Sec 18A (Set forth in full Appendix B., *Infra*, pp. 7a-8a).

> . . . The Court of Appeals from time to time shall make rules and regulations to revise the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure or administrative rules, shall be subject to the rules and regulations prescribed by the Court of Appeals or otherwise by law.

STATUTORY PROVISIONS INVOLVED

1. Section 18A, Constitution of the State of Maryland (Set forth in Appendix B, *Infra*, pp. 7a-8a).

2. Art. 26, Sections 25 & 27 of the Maryland Annotated Code (Set forth in Appendix B, *Infra*, pp. 8a-9a).

3. Sections 1-101 & 1-201 contained in the Courts and Judicial Proceedings portion of the Maryland Annotated Code (Set forth in Appendix B, *Infra*, pp. 9a-11a).

4. Maryland Rules of Procedure 1, 527 and 530 (Set forth in Appendix B, *Infra*, pp. 11a-19a).

5. Supreme Bench Rule 528L (Set forth in Appendix B, *Infra*, pp. 19a-20a).

6. Supreme Bench Rule 528M (Set forth in Appendix B, *Infra*, p. 20a).

STATEMENT OF THE CASE

In January, 1969 suit was filed in the Superior Court of Baltimore City by Connie M. Hoffer, to her own use and to the use of Hartford Accident and Indemnity

Company, for injuries which she sustained when a display counter designed and erected by the Defendant collapsed and fell on her while she was in the course of her employment. The Plaintiff continued to receive medical care, including hospitalization, after suit was filed. Due to the complex nature of both the liability and medical aspects of the case, the extensive discovery proceedings, the unavailability of medical witnesses or Judges on dates when the case was scheduled for trial, the physical inability of the Plaintiff to appear and testify because of the injuries she sustained in the accident giving rise to this action, and the conflicts in the trial calendars of counsel for the parties, the case never reached trial.

On July 13, 1972 the Clerk of the Superior Court of Baltimore City filed a Notice of Contemplated Dismissal pursuant to the provisions of Supreme Bench Rule 528L. Upon motion by the Plaintiff, the case was restored to the trial docket and scheduled for trial during the following term of court by agreement of counsel. Thereafter, for the reasons enumerated above, the case was postponed and rescheduled for trial by agreement of counsel and by Order of the Superior Court, on several occasions, with the last agreed trial date on December 2, 1974. At no time after the case was restored to the trial docket in 1972, was the case ever dismissed by the trial court; nor did the Defendant ever appeal from any of the Orders of the trial court suspending operation of the rule and granting new trial dates. In addition, in the time during which the case was pending, the Plaintiff continued to receive medical care for the injuries she sustained in the incident complained of, and discovery proceedings also went forward.

Less than one month before the agreed trial date of December 2, 1974, the Plaintiff being fully prepared for trial, the Defendant filed a Motion to Dismiss under Rule 528L, subsequent to the publication of the decision of the Maryland Court of Special Appeals in *Chase v. Jamison,* 21 Md. App. 606, 320 A.2d 580, interpreting Rule 528L. The Defendant's Motion was granted and the case was dismissed. The Maryland Court of Special Appeals, ignoring the clear language and intent of Maryland Rules 527 and 530, which allow the trial court to exercise its discretion in determining whether a cause of action ought to be dismissed or merely continued, upheld the action of the trial court, despite its recognition that the Rule "may in some cases produce harsh results." The constitutional issues raised herein were raised for the first time in Petitioner's Petition for a Writ of Certiorari filed in the Maryland Court of Appeals.

The Petitioner's cause of action was dismissed by the trial court under a local rule of court which denied to her the opportunity to present to the court evidence of her good faith efforts to place her case in a posture for trial and which denied to the trial court the opportunity to weigh such evidence and exercise its judicial discretion to determine if dismissal was warranted.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the due process principles ennuciated in this Court's *Mullane* ruling.

In *Mullane v. Central Hanover Bank & Trust Company,* 339 U.S. 306, this Court held that "the fundamental requisite of due process of law is the opportunity to be heard," and that "at a minimum," the

words of the Due Process Clause "require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case."

A claim for damages for personal injury has long been recognized as a *chose in action* and, therefore, a property right. 73 C.J.S. 178. The application of Supreme Bench Rule 528L, so as to bring about the mandatory dismissal of a cause of action which has been at issue for a given period of time without reaching trial, is a deprivation of property without due process of law when the party against whom the rule is brought to bear is denied the right to be heard regarding the efforts he has made to have his claim litigated. No distinction is made by 528L between those Plaintiffs and their attorneys who have made diligent and good faith efforts to posture their case for trial and those who have procrastinated and delayed litigation without good cause. In either case, the claim must be summarily dismissed by the court immediately upon the passing of a fixed period of time, with no discretion in the court to consider whether the interests of justice require a suspension of the operation of the rule and no recourse for even the most energetic of Plaintiffs. As Rule 528L now stands, a Plaintiff could be deprived of his property right in his cause of action through dismissal even where the court was never able to provide a judge on any scheduled trial date, or where the Plaintiff, because of the very injuries for which he was seeking redress, was physically incapable of giving testimony during the period for which the case was on the trial docket.

2. The decision below upholding the validity of Supreme Bench Rule 528L is in conflict with the constitution and laws of the State of Maryland and

denies equal protection of the laws to litigants subject to the jurisdiction of the Baltimore City Court System.

Supreme Bench Rule 528L is in direct conflict with Maryland Rules 527, dealing with the power of the court to grant a continuance, and 530, dealing with dismissals for lack of prosecution, in that 528L fails to delegate to the courts the discretion to suspend the operation of the Rule for good cause shown or when all parties have consented to a continuance. The above-cited Maryland Rules, on the other hand, and especially Rule 527(a)(1) and (2), make manifest the intention of the Court of Appeals to allow the trial court to consider the interests of justice and to permit Plaintiffs to demonstrate good cause before determining whether a continuance should be granted at a given time, regardless of the length of time during which the particular case has been at issue.

The power of courts other than the Court of Appeals to make rules of practice and procedure or administrative rules is subject to the rules and regulations prescribed by the Court of Appeals or otherwise by law. Constitution of Maryland, Art. IV, Sec. 18A. The courts of the State of Maryland, including the Supreme Bench of Baltimore City, may not promulgate rules inconsistent with those adopted by the Court of Appeals in the absence of legislative authority. Md. Ann. Code, Art. 26, Secs. 25 and 27 (repealed January 1, 1974), re-enacted as Md. Ann. Code, Courts and Judicial Proceedings, Sec. 1-201. Rule 1 of the Maryland Rules of Procedure provides for the primacy of the Rules in Chapter One thereof over all procedure in the Courts of this State, and the Maryland Court of Appeals has held that the Maryland Rules of Procedure are legislative in scope. *Ginnavan v. Silvertone*, 246 Md. 500, 229 A.2d 124 (1967).

By withholding from the Supreme Bench Courts the exercise of judicial discretion, Rule 528L patently conflicts with the operation of the corresponding provisions of Maryland Rules 527 and 530 which *do* allow such discretion. The Supreme Bench Rule thus usurps the constitutionally established and legislatively affirmed power of the Court of Appeals of Maryland over the making of Procedural Rules by lower courts in Maryland.

This conflict between Maryland Rules 527 and 530 on the one hand and Supreme Bench Rule 528L on the other, violates the Equal Protection Provisions of the XIVth Amendment of the Constitution of the United States in that Plaintiffs subject to the jurisdiction of the Courts of the Supreme Bench have greater restrictions imposed upon their right to maintain an action than do Plaintiffs subject to the jurisdiction of any other trial court in the State of Maryland. Rule 528L denies to those Plaintiffs who fall within its purvue the benefits and protection of the provisions of a Rule of Procedure having state-wide statutory scope and having been duly adopted by the Court of Appeals pursuant to its constitutional mandate by prohibiting them from demonstrating to the Court their diligence and good faith in preparing their case for trial, while Plaintiffs in other jurisdictions do have that right.

This court has considered the question of whether uniformity of law within different parts of the same state is a violation of equal protection in *Missouri v. Lewis*, 101 U.S. 22, *sub nom.*, *Bowman v. Lewis*, 25 L. Ed. 989 (1880); *Salsburg v. Maryland*, 346 U.S. 545, 74 S. Ct. 280, 98 L. Ed. 281 (1954). According to the interpretation of H. Horowitz and D. Neitring in an article entitled "Equal Protection Aspects of Inequalities in Public Education and Public Assistance Programs From Place to Place Within a State", published

in 15 U.C.L.A. L. Rev. 787, 790-91 (1968), these cases stand for the proposition that territorial uniformity is not an *absolute* constitutional requisite, so that a state "does not violate the Equal Protection Clause by establishing rules for the Administration of Justice on a territorial basis if there are adequate justifications for the classification and the impact on individuals affected adversely by the classification is not of relatively serious magnitude." *Ibid.*

The effect of the application of Rule 528L is to deprive the party against whom it is asserted of his right to a trial, clearly the loss of a serious and fundamental right. Differences in population statistics between Baltimore City and the counties are not dramatic enough to provide a rational basis for treating civil litigants in Baltimore City differently from those in the counties. Nor should any credence be given to the argument that the heavy case-load of the Courts of Baltimore City justify this distinction between litigants, as the case-load in most of the counties in Maryland have increased drastically in the past ten (10) years. See Administrative Office of the Courts Annual Report 1973-1974, at page 73. There is, indeed, no rational basis upon which the discriminatory effects of Rule 528L can be justified.

Prior to hearing the instant case, the Court of Special Appeals upheld the validity of Rule 528L in *Chase v. Jamison, supra,* ruling that the trial court lacked discretionary power to reinstate a case which was not tried during the next term subsequent to its restoration to the trial docket and had been dismissed by the trial court. In the course of its opinion, the Court of Special Appeals interpreted the discretionary power to suspend the operation of Maryland Rule 530, contained in paragraph (c) thereof, as allowing only a brief reprieve

when shown to be justified. Thus, by interpreting the language of the Maryland Rule relating to the court's discretionary power in such a way as to render it meaningless, the Appellate Court was able to hold that, because Rule 528L contained "built-in reprieves, more extensive than brief", there was no inconsistency between the two Rules.

In rendering its decision in the instant case, the Court of Special Appeals has ignored the language of Maryland Rules 527 and 530, the discretionary powers of which were clearly relied upon by the trial court when it ordered that the case be continued while the further time element of 528L was running. Nor did the Appellate Court consider the glaring difference in the factual circumstances of the two cases; i.e. the total negligence and inactivity displayed by the Plaintiffs in the *Chase* case as compared with the good faith efforts of the Plaintiff and her counsel in the instant case, combined with the consent and participation of the Defendant in all of the continuances. It is because Rule 528L operates automatically to dismiss Plaintiff's cause, irrespective of the reasons for the delay and without allowing the Plaintiff an opportunity to have his position considered by the Trial Court, that this Rule is in violation of the Constitution of the United States.

CONCLUSION

For these reasons a Writ of Certiorari should issue to repeal the Judgment and Opinion of the Maryland Court of Special Appeals and the denial of Certiorari by the Maryland Court of Appeals.

Respectfully submitted,

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December 2, 1975

APPENDIX A

Opinion
(Filed June 5, 1975)

In the Court of Special Appeals of Maryland

No. 930

September Term, 1974

Connie M. Hoffer

v.

Anthony De Crescenzo, Incorporated

Gilbert, Moore, and Mason, JJ.

Gilbert, J.:

The appellant, Connie M. Hoffer, brought suit in the Superior Court of Baltimore City on January 13, 1969 against the appellee, Anthony De Crenzo, Incorporated. The suit alleged that because of the negligent construction and installation of a "gondola",[1] the appellant was severely injured on January 14, 1966 when the gondola "collapsed and fell on top of the body of the" appellant. We were advised on oral argument that appellant had been determined by the Workmen's Compensation Commission to be disabled totally and permanently.

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[1] A health and beauty aid counter.

After the litigation had been commenced in the Superior Court, the appellee filed its plea on February 3, 1969, and the case was entered on the consolidated trial docket on February 6, 1969. The case was not tried during the succeeding three years. The docket entries under date of July 13, 1972 reveal, "Notice sent in accordance with Supreme Bench Rule 528 L." Section (1) of that rule provides:

> "(1) Each year within not less than thirty days and not more than sixty days prior to the beginning of the September Term of Court, the Assignment Commissioner shall return to the Clerk of the Court where the same was instituted all cases which have been on the Consolidated Trial Docket for a period of two years or more. Immediately upon receipt thereof the Clerk of the Court shall notify all counsel of record at their respective addresses, as shown on the pleadings, served in the manner provided by Maryland Rule 306, that an order of dismissal for lack of prosecution will be entered after the expiration of thirty days unless, prior to the expiration of such period, a motion is filed pursuant to subsection (3); in the event counsel has died or his appearance has been stricken pursuant to Maryland Rule 125 and the party represented is not represented by another attorney of record, or is proceeding in proper person, the Clerk shall send the notification required by this Section to such party at the address shown on the pleadings."

Following notice being sent to counsel, the appellant moved to restore the case to the trial docket, and an order of court dated September 1, 1972, in which the case was set for trial on December 4, 1972, was filed. We observe that the date fixed for trial was within the *first* term of court after the restoration of the case to the trial docket.[2] The issue was not tried on December 4, 1972,

[2] The terms of court before all courts of the Supreme Bench begin on the second Monday of January, May and September of each year. *See* Supreme Bench Rule 21.

instead a series of petitions and orders thereon rescheduling the trial date was commenced.[3] The case was carried forward from term to term until November 13, 1974 when appellee moved to dismiss pursuant to Rule 528 L. The motion was resisted and a hearing was held before Judge James W. Murphy who determined that the case had to be dismissed. Accordingly, Judge Murphy granted the appellee's motion.

This is the second time within the year that we have been called upon to construe Supreme Bench Rule 528 L. The rule provides that any case that has been on the trial docket for *two*[4] years or more shall be entered as dismissed after thirty days unless, prior to the expiration of that time, a motion is filed to restore the case to the trial docket.

Subsections (4) and (6) of Supreme Bench Rule 528 L provide:

> "(4) Any order is issued by the Assignment Judge of the Supreme Bench restoring a case to the Consolidated Trial Docket pursuant to subsection (3) of this Rule shall therein set a right-of-way date for the trial of said case, which date shall not extend beyond the expiration of the next Term of Court; except that where the Assignment Judge is satisfied that it has been impossible to try said case on the date assigned, or a day subsequent

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[3] The docket entries reveal:

September 1, 1972—Order of Court setting case for trial on December 4, 1972 (Cole, J.).

January 5, 1973—Plaintiff's petition to extend time for trial until April 4, 1973. Order of Court granting same (Cole, J.).

June 25, 1973—Plaintiff's petition to extend time for trial. Order of Court granting same and setting case for trial on October 10, 1973 (Thomas, J.).

October 12, 1973—Order that case be continued to be rescheduled subsequent to December 10, 1973 (Carter, J.).

June 18, 1974—Order that case be tried on December 2, 1974 (Foster, C.J.).

[4] Prior to September 9, 1974 the time period was *three* years.

thereto within that Term, because of the pendency of other cases on the Consolidated Trial Docket, he may assign a trial date not beyond the next subsequent Term of Court.

(6) Any case not tried or otherwise finally disposed of *within the term of Court following the date of issuance of an order replacing a case on the consolidated trial docket* pursuant to subsections (3) and (4) of this rule shall under no conditions be ordered reinstated by any order of Court or otherwise and shall be returned by the Assignment Commissioner to the Clerk of the Court in which the case was instituted and shall be forthwith marked dismissed by the Clerk." (Emphasis supplied).

This Court in *Chase v. Jamison*, 21 Md. App. 606, 320 A.2d 580 (1974) had before it a case wherein the rule was employed, and a "motion to restore the case to the trial docket was filed. . . . The motion was heard and an order was entered restoring the case and setting . . . [a] final trial date." The case was not tried on the "final trial date", which occurred in the September Term, 1972, nor was it reached for trial in the January Term, 1973. In the words of Judge Powers, speaking for this Court at 21 Md. App. 610, the case then, "reached the end of its rope." Judge Powers pointed out that:

> "The court's discretionary control over the case extended for a period in excess of three[5] years, plus the span of two more terms of court. We think that the purpose and the effect of Rule 528L are to fix an outside limit on the time for termination of litigation, beyond which limit the reasons why a case has not been terminated become irrelevant, the case is removed from the area of judicial discretion, and the only action permitted is the application of the self-executing provisions of the rule, willy-nilly, however harsh or arbitrary the result may be."

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[5] *But see* n.4, *supra*, and current Supreme Bench Rule 528 L(1).

In the case now before us counsel for the appellant seek to distinguish their cause from *Chase*. They argue:

> "It should be noted that in the time span within a nine month period prior to the date set for trial of this case . . . both Plaintiff and Defendant's counsel had been engaged in continuing discovery proceedings and that Depositions were, in fact, taken on the day before the hearing on the Motion to Dismiss filed herein. Additionally, and more significantly, it should be noted that during that same period of time, all counsel had full knowledge as to what facts were transpiring during that time span and, in fact, negotiations were being conducted, an offer having been made by Appellee's counsel to the Appellant to settle her claim."

We recognize that both the appellant and the appellee proceeded to carry forward the instant case from term to term, apparently oblivious to the strict requirements of Rule 528 L. Indeed, it was not until after *Chase v. Jamison, supra,* that appellee moved to dismiss, and in so doing bottomed its motion on *Chase.*

We are cognizant that Rule 528 L may in some cases produce harsh results, but the Rule is founded with,

> ". . . a clear eye on justice . . . which must be always available to litigants who diligently seek it . . . To achieve it, those responsible for running the machinery of the court system, the means to that end, must be ever watchful that the machinery does not become fouled by cases which impair the system's ability to achieve its broad goal. Supreme Bench Rule 528L is one way of keeping watch." *Chase v. Jamison, supra* at 611.

Chase v. Jamison, supra, is dispositive of the case at Bar. It is to be observed that Judge Cole's order of January 5, 1973, *see* n.3, *supra,* set the case for trial on April 4, 1973, a date falling within the *second* term following the restoration of the case to the trial docket. *See* Supreme Bench Rule 528 L(4) and (6). Trial not having occurred within the second term following the

restoration of the case to the trial docket, the matter was terminated, and no amount of judicial orders, n.3, *supra*, or agreements of counsel, could resurrect the court's control over the case. In short, when discretionary control was terminated, "All the king's horses and all the king's men couldn't . . . [revive it] again."

Judgment Affirmed;
Costs to be paid by Appellant.

ORDER

In the
Court of Appeals of Maryland

Miscellaneous Docket No. 208

September Term, 1975

(No. 930, September Term, 1974
Court of Special Appeals)

Connie M. Hoffer et al.
v.
Anthony DeCrescenzo, Inc.

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the said petition be, and it is hereby, denied as

there has been no showing that review by certiorari is desirable and in the public interest.

/s/ ROBERT C. MURPHY,
Chief Judge.

Date: September 8, 1975.

APPENDIX B

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* * * * * *

CONSTITUTION OF THE STATE OF MARYLAND

Section 18A. Powers and duties of Chief Judge of Court of Appeals; assignment of judges; rule-making power of Court of Appeals.

The Chief Judge of the Court of Appeals shall be the administrative head of the Judicial system of the State. He shall from time to time require, from each of the judges of the Circuit Courts for the several counties, of the Supreme Bench of Baltimore City, of the District Court and of any intermediate courts of appeal, reports as to the judicial work and business of each of the judges and their respective courts. He may, in case of a vacancy, or of the illness, disqualification or other absence of a judge or for the purpose of relieving an accumulation of business in any court assign any judge except a judge of the Orphans' Court to sit temporarily in any court except an Orphans' Court. Any judge assigned by the Chief Judge of the Court of Appeals pursuant to this section shall have all the power and authority pertaining to a judge of the court to which he is so assigned; and his power and authority shall continue with respect to all cases (including any motion, or other matters incidental thereto) which may come before him by virtue of such assignment until his action thereon shall be completed. In the absence of the Chief Judge of the Court of Appeals the provisions of

this section shall be applicable to the senior judge present in said Court of Appeals. The powers of the Chief Judge under the aforegoing provisions of this section shall be subject to such rules and regulations, if any, as the Court of Appeals may make. The Court of Appeals from time to time shall make rules and regulations to revise the practice and procedure in and the administration of the appellate courts and in the other courts of this State, which shall have the force of law until rescinded, changed or modified by the Court of Appeals or otherwise by law. The power of courts other than the Court of Appeals to make rules of practice and procedure, or administrative rules, shall be subject to the rules and regulations prescribed by the Court of Appeals or otherwise by law.

* * * * * *

ANNOTATED CODE OF MARYLAND ARTICLE 26

* * * * * *

§ 25. May prescribe rules of practice and procedure — In general.

The Court of Appeals is authorized and requested to prescribe by general rules, the practice and procedure in all civil actions both at law and in equity in all courts of record throughout the State. Such general rules may, if the judges of the Court of Appeals deem it advisable, unite the practice and procedure in actions at law and suits in equity so as to secure one form of civil action and procedure for both. Such general rules may regulate all appeals in civil actions and may likewise regulate the form and method of taking and the admissibility of evidence in all civil actions. Such rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant, nor shall any such rules apply to practice and procedure in criminal cases, but as used in §§ 25-28, the terms "practice and procedure" shall be liberally construed, and without intending hereby to limit their comprehensive application, shall be deemed to include the forms of process, writs, pleadings and motions, and the subjects of parties, depositions, discovery, trials, judgments, new trials and provisional and final

remedies. Such general rules shall be reported to the General Assembly of Maryland within thirty days after the beginning of its next regular session and except as modified or repealed by act of the General Assembly shall take effect on the 1st day of September, 1941. Upon taking effect, such rules and any subsequent amendments or additions thereto, shall supersede any prior inconsistent public general law, public local law, municipal ordinance or rule of the Court of Appeals or any other court. Such rules may be rescinded, changed, modified or added to from time to time by the Court of Appeals or by the General Assembly, and such alterations or additions to the rules shall become effective at such time as the Court of Appeals or General Assembly shall provide.

* * * * * *

§ 27. Other courts may establish rules not inconsistent with rules of Court of Appeals.

The judges of the Supreme Bench of Baltimore City shall have power to establish rules governing the practice and procedure in the courts of Baltimore City, except the Orphans' Court and the Municipal Court, and the judges of the Court of Special Appeals and of the circuit courts of the counties and of the Orphans' Courts of Baltimore City and of the counties shall have power to establish rules governing the practice and procedure in their respective courts, provided that such rules shall not be inconsistent with any general rules adopted by the Court of Appeals, or with any statute then or thereafter in force.

* * * * * *

COURTS AND JUDICIAL PROCEEDINGS

COURT STRUCTURE AND ORGANIZATION.

Subtitle 1. Definitions.

§ 1-101. In general.

(a) In this title, the following words or terms have the meanings indicated.

(b) *"Circuit court"* means the circuit court for a county, the Superior Court of Baltimore City, Court of Common Pleas, Baltimore City Court, Circuit Court of Baltimore City, Circuit Court No. 2 of Baltimore City, and Criminal Court of Baltimore, or any of them, unless the context clearly requires a contrary meaning.

(c) *"Court"* means the Court of Appeals, Court of Special Appeals, circuit court, and District Court of Maryland, or any of them, unless the context clearly requires a contrary meaning. It does not include an orphans' court, or the Maryland Tax Court.

(d) *"Judge"* means a judge of a court.

* * * * * *

Subtitle 2. General.

§ 1-201. Rule-making power.

(a) *Court of Appeals.* — The power of the Court of Appeals to make rules and regulations to govern the practice and procedure and judicial administration in that court and in the other courts of the state shall be liberally construed. Without intending to limit the comprehensive application of the term "practice and procedure", the term includes the forms of process; writs; pleadings; motions; parties; depositions; discovery; trials; judgments; new trials; provisional and final remedies; appeals; unification of practice and procedure in actions at law and suits in equity, so as to secure one form of civil action and procedure for both; and regulation of the form and method of taking and the admissibility of evidence in all cases, including criminal cases.

(b) *Other Courts.* — Except for the District Court, other courts may by rule regulate terms of court for purposes other than the return of process and may make other rules of practice and procedure subject to and not inconsistent with any rule of the Court of Appeals. However, except for a rule regulating terms of court, every rule shall be adopted pursuant to the limitations and procedures prescribed by the Maryland

Rules, unless authority to adopt rules is expressly granted by public general law. For the purpose of applying this section to the several courts comprising the Supreme Bench of Baltimore City, "court" means the Supreme Bench of Baltimore City.

* * * * * *

MARYLAND RULES OF PROCEDURE

GENERAL

Rule 1. Scope of Rules ..... Gen'l.

a. *Numbering as Descriptive of Scope.*

Except as otherwise expressly provided or necessarily implied:

1. Chapters 1, 100-600.

The Rules in Chapter 1 apply to all procedure in courts of this State including the Court of Appeals and the Court of Special Appeals.

The Rules in Chapters 100-600 bearing numbers of which the last two digits constitute numbers between 1 and 39, inclusive, apply to procedure generally, both at law and in equity.

The Rules in Chapters 100-600 bearing numbers of which the last two digits constitute numbers between 40 and 69, inclusive, apply to procedure at law only.

The Rules in Chapters 100-600 bearing numbers of which the last two digits constitute numbers between 70 and 99, inclusive, apply to procedure in equity only.

The Rules in Chapters 100-600 do not apply to the proceedings dealt with in Chapters 700, 800, 900 and 1000.

The Rules in Chapters 1, 100-600 apply to the Special Proceedings dealt with in Chapter 1100.

2. Criminal Causes—Chapter 700.

The Rules in Chapter 700 only apply to criminal cases.

3. Appeals to the Court of Appeals—Chapter 800.

The Rules in Chapter 800 apply only to appeals to the Court of Appeals.

4. Juvenile Causes—Chapter 900.

The Rules in Chapter 900 apply only to Juvenile Causes.

5. Appeals to the Court of Special Appeals—Chapter 1000.

The Rules in Chapter 1000 apply only to appeals to the Court of Special Appeals.

6. Special Proceedings—Chapter 1100.

The Rules in Chapter 1100 apply only to the Special Proceedings with which they purport to deal.

7. Court Administration—Chapter 1200.

The Rules in Chapter 1200 (Court Administration) apply generally to the administration of the courts of the State in accordance with the provisions thereof. The numbering system of other Chapters, indicating distinctions between general, law and equity rules, does not apply to Chapter 1200.

b. *Procedure.*

"Procedure" includes all matters and subjects on which the Court of Appeals is authorized to prescribe general rules by Article IV, sections 18 and 18A of the Constitution or by Code, Article 26, section 25, or otherwise.

c. *Application to Maryland.*

All provisions and references, except insofar as expressly provided, or as may result from necessary implication, refer to the Constitution, laws and officers and institutions of the State of Maryland.

d. *Law and Equity Distinct.*

These Rules shall not be interpreted to affect the existing distinction between law and equity.

e. *Statutes Adopted as Rules.*

Except as modified or superseded by these Rules, all existing general statutes regulating practice and procedure in all criminal and civil actions at law and in equity, including juvenile causes, in courts of this State are hereby adopted as general rules of the Court of Appeals, pursuant to its powers under Article IV, sections 18 and 18A of the Constitution and of Code, Article 26, section 25.

f. *Local Rules.*

1. Validity—Rules for Judicial Circuit.

Except to the extent inconsistent with the Maryland Rules, local or circuit-wide rules in effect on April 1, 1969 shall remain in effect until repealed or modified. Effective six months after said date, however, any local rule applicable to the court of a single county and not adopted on a circuit-wide basis shall stand repealed. Thereafter, no local rule shall be adopted except on a circuit-wide basis and by action of a majority of the judges of the judicial circuit concerned. All such circuit-wide rules shall have a numbering system and arrangement consistent with the numbering system and arrangement of the Maryland Rules; and upon adoption shall be forwarded to the Court of Appeals and to the Director of the Administrative Office of the Courts and shall become effective as provided in Subsection 2 of this Section.

2. Adoption and Amendment—Procedure.

On April 1, 1969, and until six months after said date, local rules may be repealed, modified or adopted by the judges of the Supreme Bench of Baltimore City or the judge or judges of the Circuit Court for any county, for their respective jurisdictions. Thereafter, local rules shall be repealed, modified or adopted on a circuit-wide basis by a majority of the judges of the judicial circuit concerned. In any case, such rules shall become effective as provided therein, but upon the adoption, repeal or modification of any such rule, the Circuit

Administrative Judge of the judicial circuit within which the rule was adopted, repealed or modified shall forthwith send a copy of the same to the Chief Judge of the Court of Appeals, and the Court of Appeals shall have power to modify or abrogate the rule. Such Circuit Administrative Judge shall likewise send a copy of the rule to the Director of the Administrative Office of the Courts, who shall cause the same to be published in such manner as he may deem fit.

g. *Terms of Court.*

Terms of the courts for purposes other than the return of process may be regulated by rules or orders of the respective courts, except that any such rules or orders in Baltimore City shall be by the Supreme Bench of Baltimore City.

h. *Modification of Statutory Provisions.*

Where in these Rules there is incorporated a part but not all of a preexisting statute, the part of such preexisting statute omitted from these Rules shall not be abrogated or affected, unless expressly so provided, or such part be inconsistent with these Rules, or such abrogation or modification may result from necessary implication.

i. *Jurisdiction Not Affected.*

These Rules shall not be construed to extend, limit or affect the jurisdiction of any court.

j. *Venue Not Affected.*

These Rules shall not apply to venue of actions at law and in equity except insofar as expressly provided herein.

Rule 527. Continuance or Postponement....Gen'l.

a. *Generally.*

1. In Court's Discretion.

The court may upon motion of any party, or of its own motion, continue an action from time to time in order that a trial may be had upon the merits or as the interests of justice may require; but

2. Not Beyond Second Term Unless by Consent, for Cause, or by Rule.

No action shall be continued beyond the second term after process has been served on the defendant, unless by consent of the parties, or upon good cause shown by the party asking the continuance, or when these Rules otherwise so provide.

b. *Attorney in Legislature.*

When it shall appear that any attorney of record of any party to any action at law or in equity is a member of the General Assembly of Maryland or a desk officer of either House of the General Assembly, and that said General Assembly of Maryland shall then be in session, such action shall be continued from time to time until ten days after said General Assembly of Maryland shall have adjourned, unless such attorney upon the call of such action for trial waive the benefit of this Rule. When it shall appear that any attorney of record of any party to any action at law or in equity is a member of the Legislative Council of Maryland, or one of its subcommittees, such action shall be continued when the said Legislative Council, or said subcommittee, as the case may be, is holding a meeting, unless such attorney shall upon the call of such action for trial waive the benefit of this Rule. Whenever it shall be necessary to file a brief or memorandum of law in any action at law or in equity, which has been continued under the provisions of this Rule, then such action shall be continued for a time sufficient to prepare and file such brief or memorandum.

c. *Absent Witness.*

1. Motion for Continuance—Affidavit.

A motion for a continuance or postponement on the ground that the evidence of an absent witness is wanting must be supported by an affidavit of the party making the application or of some other credible person.

2. Affidavit—Contents.

The affidavit shall show that the testimony of the absent witness is material, competent and proper, that the affiant believes that the action cannot be tried with justice to the party without such evidence, that the affiant has used reasonable diligence to procure the same, and that the affiant has a reasonable expectation and belief that such witness can be procured within a reasonable time. The affidavit shall further show what facts the affiant believes the witness will prove, and not merely the effect of such facts in evidence, and that the affiant believes them to be true.

3. Examination by Court.

The court may examine the affiant on oath as to any of the matters alleged in the affidavit, and on what information or knowledge he believes the witness will prove what is alleged.

4. Effect of Admission.

If, upon the affidavit, or upon examination, the court is satisfied of the truth of the affidavit and that the testimony is material and competent, the court may continue or postpone the case for such time as may be deemed necessary to enable the party to procure the attendance or obtain the testimony of such absent witness, unless the opposite party will admit that the absent witness would, if present, testify to the facts alleged in the affidavit.

5. Consent to Deposition.

Where the testimony of an absent witness, whether resident or nonresident, may be taken by deposition and the opposite party will not admit that the absent

witness would if present testify to the facts alleged in the affidavit, the court may grant a continuance or postponement for the purpose of taking the deposition of such absent witness.

6. Right to Impeach or Contradict.

An admission by the opposite party, or the taking of a deposition, pursuant to subsections 4 and 5 hereof, shall not deprive the opposite party of the right to impeach or contradict the testimony of the absent witness in the same manner as if such witness had been present.

d. *When New Trial Granted or Judgment Set Aside.*

Where a new trial is granted or where a judgment shall be set aside for fraud or irregularity, the court may continue or postpone the action so long as it shall deem necessary for a trial thereof.

e. *Costs—By Whom Paid.*

Where a continuance or postponement is granted, the court shall make such order as to costs theretofore accrued as may be just.

Rule 530. Dismissal for Lack of Prosecution

..... **Gen'l**

a. *Dismissal of Action Pending Eighteen Months Without Proceedings.*

Any pending action in which no proceedings of record other than proceedings under this Rule, have been taken within a period of eighteen months shall be subject to dismissal for lack of prosecution under the provisions of this Rule.

b. *Notification of Contemplated Dismissal.*

In all such actions the clerk shall notify counsel of record that an order of dismissal for lack of prosecution will be entered after the expiration of thirty (30) days

unless prior to the expiration thereof a motion is filed under section c of this Rule. In the event counsel has died or his appearance has been stricken pursuant to Rule 125 (Attorney — Striking Appearance), and the party represented is not represented by another attorney of record, the clerk shall send the notification required by this section to such party at the address shown on the pleadings. The notification shall be served in the manner provided by Rule 306 (Service of Pleadings and Other Papers).

c. *Motion for Suspension of Dismissal Rule.*

On motion filed at any time prior to thirty days after service of such notice, computed according to section c 3 of Rule 306 (Presumptions in Case of Service by Mail), the court for good cause shown may suspend the operation of this Rule upon such terms as the court may prescribe.

d. *Entry of Dismissal and Assessment of Costs.*

Thirty days after service of such notice, computed according to section c 3 of Rule 306 (Presumptions in Case of Service by Mail), the clerk shall enter on the docket "Dismissed for want of prosecution without prejudice," unless prior to that time a motion shall have been filed under section c of this Rule, or unless the court shall previously have suspended the operation of this Rule. The clerk shall thereafter assess costs against the plaintiff.

e. *Exceptions.*

This Rule shall not apply to actions involving the military docket, continuing trusts, guardianships, estates of incompetents, or issues from an Orphans' Court. An action for divorce *a mensa et thoro* shall be subject to dismissal under this Rule only if no proceedings have been taken within a period of two and one-half years.

f. *Powers of Trial Courts.*

Courts may by rule or order provide for a period longer than, but not less than, eighteen months in all actions or in certain classes of actions other than those actions provided for in section e of this Rule.

RULES OF THE SUPREME BENCH OF BALTIMORE CITY

528L. Dismissal for Failure of Prosecution.

(1) Each year within not less than thirty days and not more than sixty days prior to the beginning of the September Term of Court, the Assignment Commissioner shall return to the Clerk of the Court where the same was instituted all cases which have been on the Consolidated Trial Docket for a period of *two* years or more. Immediately upon receipt thereof the Clerk of the Court shall notify all counsel of record at their respective addresses, as shown on the pleadings, served in the manner provided by Maryland Rule 306, that an order of dismissal for lack of prosecution will be entered after the expiration of thirty days unless, prior to the expiration of such period, a motion is filed pursuant to subsection (3); in the event counsel has died or his appearance has been stricken pursuant to Maryland Rule 125 and the party represented is not represented by another attorney of record, or is proceeding in proper person, the Clerk shall send the notification required by this Section to such party at the address shown on the pleadings.

(2) All cases returned to a Clerk of the Court pursuant to subsection (1) of this rule shall be dismissed by the Clerk and a judgment for costs shall be entered in favor of the defendant after the expiration of a period of thirty days following said notice by the Clerk.

(3) No case shall be dismissed by the Clerk pursuant to subsection (2) hereof if prior to the expiration of the period of thirty days following the notice to counsel by the Clerk of the return of said case to the Clerk by the

Assignment Commissioner any party upon motion and good cause shown shall obtain from the Assignment Judge of the Supreme Bench an order restoring said case to the consolidated trial docket.

(4) Any order issued by the Assignment Judge of the Supreme Bench restoring a case to the Consolidated Trial Docket pursuant to subsection (3) of this Rule shall therein set a right-of-way date for the trial of said case, which date shall not extend beyond the expiration of the next Term of Court; except that where the Assignment Judge is satisfied that it has been impossible to try said case on the date assigned, or a day subsequent thereto within that Term, because of the pendency of other cases on the Consolidated Trial Docket, he may assign a trial date not beyond the next subsequent Term of Court.

(5) The date fixed in an order of Court issued pursuant to subsection (4) of this rule shall be by agreement of the parties and it shall be the obligation of the moving party to obtain such a date by agreement of all other parties and if said party shall be unable to obtain such agreement, then the Assignment Judge upon notice to all parties and opportunity to be heard shall fix said date.

(6) Any case not tried or otherwise finally disposed of within the term of Court following the date of issuance of an order replacing a case on the consolidated trial docket pursuant to subsections (3) and (4) of this rule shall under no conditions be ordered reinstated by any order of Court or otherwise and shall be returned by the Assignment Commissioner to the Clerk of the Court in which the case was instituted and shall be forthwith marked dismissed by the Clerk.

528M. Maryland Rule 530 Not Superseded.
(Added May 1, 1970)

None of the provisions of this Rule 528 shall be construed as in any measure superseding, supplanting or modifying the application of Maryland Rule 530. (Added May 1, 1970)

INDEX

	PAGE
OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATUTES AND REGULATIONS INVOLVED	2
STATEMENT	2
ARGUMENT	4
CONCLUSION	8
APPENDIX	1a

TABLE OF CITATIONS

Cases

Chappell Chemical and Fertilizer Co. v. Sulphur Mines Co., 172 U.S. 474 (1898)	7
Edelman v. People of State of California, 344 U.S. 357 (1953)	4
Hoffer v. Anthony DeCrescenzo, Inc., 26 Md. App. 655, 338 A.2d 424 (1975)	3
Mallett v. North Carolina, 181 U.S. 589, 21 S.Ct. 730, 45 L.Ed. 1015 (1901)	7
Missouri v. Lewis, 101 U.S. 22 (1879)	7
Pappalardo v. Lloyd, 266 Md. 512, 295 A.2d 221 (1972)	7
Salsberg v. Maryland, 346 U.S. 544 (1954)	7

Statutes

	PAGE
28 U.S.C., Sec. 1257(3)	2
Courts and Judicial Proceedings Volume, Annotated Code of Maryland, Section 12-307	5
Courts and Judicial Proceedings Volume, Annotated Code of Maryland, Section 12-308	4

Rules of Court

Rule 23(f) Supreme Court Rules	6
Rule 5(i) of The Maryland Rules of Procedure	5
Rule 530 of The Maryland Rules of Procedure	7
Rule 800(b) of the Maryland Rules of Procedure	5
Rule 810 of The Maryland Rules of Procedure	5
Rule 885 of The Maryland Rules of Procedure	5
Rule 1000(d) of The Maryland Rules of Procedure	5
Rule 1085 of The Maryland Rules of Procedure	5
Rule 528L of The Supreme Bench of Baltimore City	3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-803

CONNIE M. HOFFER, ET AL.,

Petitioners,

v.

ANTHONY DeCRESCENZO, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF MARYLAND

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Special Appeals of Maryland is reported at 26 Md. App. 655 and at 338 A.2d 424. The decision of the Court of Appeals of Maryland, denying Petitioner's request for a writ of certiorari to review the Court of Special Appeals

decision, is printed in Appendix A of the Petition for a Writ of Certiorari, filed by Connie M. Hoffer.

JURISDICTION

Petitioner attempts in this case to base the jurisdiction of this Court on 28 U.S.C., Sec. 1257(3). However, for the reasons set out below, there is no jurisdiction in this Court as the question of whether a statute of Maryland applicable to this case is repugnant to the United States Constitution was not properly raised by Petitioner in the Courts of Maryland.

QUESTIONS PRESENTED

Petitioner seeks to raise the following questions:

1. Whether Rule 528L of the Supreme Bench of Baltimore City violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution; and,

2. Whether Rule 528L of the Supreme Bench of Baltimore City violates the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution.

STATUTES AND REGULATIONS INVOLVED

In the Petition for a Writ of Certiorari filed on behalf of Connie M. Hoffer the applicable statutes of the State of Maryland are set out.

STATEMENT

Petitioner in January of 1969 filed suit in the Superior Court of Baltimore City (one of the Courts of the Supreme Bench of Baltimore City) against the Respondent for personal injuries Petitioner allegedly sustained as a result of the collapse of a shelf erected by

Respondent. On July 13, 1972, the case having remained on the trial docket for three years without having been tried, the Clerk of the Superior Court of Baltimore City, pursuant to Rule 528L(1) of the Supreme Bench of Baltimore City, sent a notice to all counsel that the case would be dismissed in thirty days unless within that time period an order was signed reinstating the case to the trial docket, pursuant to Rule 528L(3). Such an order was signed within the applicable time limit; however, as of November 13, 1974 this case had not been tried, despite the fact that numerous trial dates had been set in the interim. On November 13, 1974 Respondent filed a motion to dismiss the case on the basis that the case had not been tried within the time period set out in Rule 528L(4) and (6)[1] and the motion was granted. Petitioner then exercised her right of automatic appeal to the Court of Special Appeals of Maryland, which affirmed the lower Court's decision. *Hoffer v. Anthony DeCrescenzo, Inc.*, 26 Md. App. 655, 338 A.2d 424 (1975). Petitioner then sought a writ of certiorari from the Court of Appeals of Maryland, which was denied.

As is admitted in the Petition for a Writ of Certiorari and as is clearly shown by the record in this case, the first time Petitioner raised the question of whether Rule 528L of the Supreme Bench of Baltimore City was repugnant to the United States Constitution was in the petition for writ of certiorari in the Court of Appeals of Maryland. This question was not raised in the Superior Court of Baltimore City, nor in the Court of Special Appeals of Maryland.

[1] Rule 528L(4) and (6) provides that a case must be tried within two terms of court from the term in which it is reinstated to the trial docket, pursuant to Rule 528L(3). In the instant case the order reinstating the case was signed on September 1, 1972 and the next two subsequent terms of Court ended on May 13, 1973.

ARGUMENT

As set out by this Court in the case of *Edelman v. People of State of California,* 344 U.S. 357 (1953):

> "It is clear that this Court is without power to decide whether constitutional rights have been violated when the federal questions are not seasonably raised in accordance with the requirements of state law. Hulbert v. City of Chicago, 1906, 202 U.S. 275, 26 S. Ct. 617, 50 L. Ed. 1026; Mutual Life Ins. Co. v. McGrew, 1903, 188 U.S. 291, 308, 23 S. Ct. 375, 378, 47 L. Ed. 480. Noncompliance with such local law can thus be an adequate state ground below." 344 U.S., at 358-9.

It is the position of the Respondent that the Constitutional questions which Petitioner seeks to bring before this Court were not seasonably raised in accordance with the requirements of the law of Maryland and as a result this Court is without power or jurisdiction to decide these questions as they were not properly preserved and there is an adequate state ground for the decision of the Maryland Court of Appeals denying the petition for writ of certiorari filed with it by Connie M. Hoffer.

The laws of Maryland provide a two step appellate review of a decision of the Superior Court of Baltimore City. An automatic right of appeal to the Court of Special Appeals of Maryland is afforded a litigant from an adverse decision of the Superior Court of Baltimore City. Courts and Judicial Proceedings Volume, Annotated Code of Maryland, Section 12-308. A litigant then may appeal to the Court of Appeals of Maryland, but only by petitioning the Court of Appeals for a writ of certiorari, the granting of which lies within the discretion of the Court of Appeals. Courts and Judicial Proceedings Volume, Annotated Code of Maryland,

Section 12-307; Rule 810 of the Maryland Rules of Procedure.[2]

The scope of the questions which can be reviewed by either the Court of Special Appeals of Maryland or the Court of Appeals of Maryland is governed by the Maryland Rules of Procedure.[3] Rule 1085 of the Maryland Rules of Procedure provides as to the Court of Special Appeals of Maryland that:

> "This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the lower court. . . ."

The term "lower court" as used in the aforementioned rule means, "the court from which an appeal is taken to this Court." Rule 1000(d) of the Maryland Rules of Procedure. In the instant case the "lower court" is the Superior Court of Baltimore City. Rule 885 of the Maryland Rules of Procedure provides as to the Court of Appeals of Maryland that:

> "This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the circuit court. . . ."

The term "circuit court" as used in the aforementioned rule includes the Superior Court of Baltimore City. Rules 5(i) and 800(b) of the Maryland Rules of Procedure.

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[2] Rule 810 METHOD OF SECURING REVIEW — BY WRIT OF CERTIORARI

> The sole method of securing review by this Court is by writ of certiorari.

[3] The Maryland Rules of Procedure are set out in Volume 9B of the Annotated Code of Maryland (1957, 1971 Replacement Volume.)

In the instant case a review of the record clearly indicates that the Constitutional issues which Petitioner seeks to bring before this Court were not raised by Petitioner in the Superior Court of Baltimore City, nor decided by that court. Thus, under the applicable rules set out above, these Constitutional questions could not have been decided by either the Court of Special Appeals of Maryland or the Court of Appeals of Maryland.[4] As a result, these questions were not seasonably raised in accordance with the requirements of Maryland law and this Court is without the power or jurisdiction to decide these questions as there is an adequate state ground for the decision of the Court of Appeals of Maryland denying the petition for writ of certiorari filed by Connie M. Hoffer.[5]

[4] The necessity of raising the federal question in the Superior Court of Baltimore City is emphasized by Rule 23 of the Supreme Court Rules, which requires that a petition for writ of certiorari contain:

> "(f) If review of the judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings in the *court of first instance* and in the appellate court, at which, and the manner in which, the federal questions sought to be reviewed were raised; the method of raising them (e.g., by a pleading, by request to charge and exceptions, by assignment of error); and the way in which they were passed upon by the court; such pertinent quotations of specific portions of the record, or summary thereof, with specific reference to the places in the record where the matter appears (e.g., ruling on exceptions, portion of the court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this court jurisdiction to review the judgment on writ of certiorari." (Emphasis added.)

[5] It should be noted that Respondent raised in its answer to the petition for writ of certiorari filed by Connie M. Hoffer in the Court of Appeals of Maryland the question of whether Petitioner's Constitutional issues were properly raised and decided in the lower courts of Maryland. A copy of Respondent's answer is printed in the Appendix to this brief.

Based on what has been set out above concerning the jurisdictional question involved in this case, little need be said concerning the substance of Petitioner's Constitutional issues. Rule 528L of the Supreme Bench of Baltimore City is nothing more than an attempt by the Supreme Bench of Baltimore City to keep its dockets clear of stale litigation. It no more violates Petitioner's right to due process under the Fourteenth Amendment than the statute of limitations applicable to claims such as those of the Petitioner. Further, Rule 528L of the Supreme Bench of Baltimore City does not violate Petitioner's right to equal protection. Initially, it should be pointed out that there is no discriminatory classification created by the operation of Rule 528L. Rule 530 of the Maryland Rules of Procedure, (set out in the Appendix to the Petition for a Writ of Certiorari filed in this case) provides a state-wide procedure for dismissing cases that have been pending on the dockets for a specific time period without being tried.[6] Further, even if there is a discriminatory classification it is on the basis of a geographic subdivision (Baltimore City) and such a classification has been upheld. *Salsberg v. Maryland,* 346 U.S. 544 (1954); *Mallet v. North Carolina,* 181 U.S. 1015 (1901); *Chappell Chemical and Fertilizer Co. v. Sulphur Mines Co.,* 172 U.S. 474 (1898); *Missouri v. Lewis,* 101 U.S. 22 (1879).

[6] For an application of Rule 530 of the Maryland Rules of Procedure to facts similar to the instant case see: *Pappalcardo v. Lloyd,* 266 Md. 512, 295 A.2d 221 (1972).

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari filed by Connie M. Hoffer should be denied.

Respectfully submitted,

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(Date)

APPENDIX

In the Court of Appeals of Maryland

September Term 1975
Misc. Docket No. 208
Connie M. Hoffer, et al.,
Petitioner,

v.

Anthony DeCrescenzo, Incorporated,
Respondent.

ANSWER OF ANTHONY DECRESCENZO, INCORPORATED TO THE PETITION FOR WRIT OF CERTIORARI

Petitioners filed suit against the Respondent in the Superior Court of Baltimore City on January 13, 1969 and after service of process was obtained on Respondent this case was placed on the consolidated trial docket on February 16, 1969. This case having remained on the consolidated trial docket for three years without having been tried, on July 13, 1972 the Clerk of the Superior Court of Baltimore City, pursuant to Rule 528L(1) of the Supreme Bench of Baltimore City, sent a notice to all counsel informing them that this case would be dismissed unless a motion to reinstate the case was filed within thirty days. Petitioner filed such a motion within the applicable time limit and the Superior Court of Baltimore City, exercising its discretion, reinstated the case to the consolidated trial docket, pursuant to Rule 528L(3) of the Supreme Bench of Baltimore City. After this case had been reinstated numerous trial dates were set, but as of November 13, 1974 this case had not been tried. On that date Respondent filed a motion to dismiss this case on the basis that the case had not

been tried within the two next subsequent court terms from the term in which it had been reinstated to the consolidated trial docket as Rule 528L(4) and (6) required. Respondents' motion was granted by the Supreme Bench of Baltimore City and this decision was affirmed by the Court of Special Appeals, (No. 930, Sept. Term 1974, decided June 5, 1975), its mandate being issued on July 7, 1975. Petitioners then filed a Petition for a Writ of Certiorari to this Court.

It is important to note that the Petition does not question the correctness of the decisions of the Superior Court of Baltimore City and the Court of Special Appeals that the provisions of Rule 528L (4) and (6) required this case to be dismissed pursuant to the Respondents' motion, but Petitioner claims that Rule 528L is invalid because it is in conflict with Rules 530 and 527 of the Maryland Rules of Procedure and it violates Petitioners' rights of equal protection and due process.

This Court should not issue a writ of certiorari in this case as the issues set out in the Petition are beyond the scope of this Court's appellate review as set out in Rule 885 of the Maryland Rules of Procedure. Rule 885 provides that this Court "will not ordinarily decide any points or questions which do not plainly appear by the record to have been tried and decided by the lower court." From a review of the record in this case it is clear that Petitioner neither in the Superior Court of Baltimore City nor in the Court of Special Appeals raised the questions as to whether Rule 528L is invalid because it is inconsistent with Maryland Rules 530 and 527 and it violates Petitioners' rights of equal protection and due process. Thus, the record does not plainly indicate that these questions were decided by the lower court and by the provisions of Rule 885 cannot be raised in this Court.

Further, the issues raised in the Petition are without sufficient merit to warrant this Court granting a writ of certiorari.

Petitioners first raise the point that Rule 528L of the Supreme Bench of Baltimore City is invalid because it is in conflict with Rule 530 of the Maryland Rules of Procedure. Quite to the contrary Rule 528L of the Supreme Bench of Baltimore City and Rule 530 of the Maryland Rules of Procedure are consistent and are both aimed at removing stale litigation from the court dockets. Under the provisions of Rule 528L of the Supreme Bench of Baltimore City any case which remains on the Supreme Bench consolidated trial docket for a three year period (it should be noted that the three year period is applicable to this case although the rule has been amended to substitute a two year period) without being tried is to be dismissed after notice is sent to all counsel. However, within a thirty day period after notice is sent that the case is going to be dismissed the various courts of the Supreme Bench of Baltimore City in their discretion can reinstate the case to the consolidated trial docket. If the case is reinstated the provisions of Rule 528L (4) and (6) require that it be tried within the next two subsequent court terms from the term in which it is reinstated and if not the case is to be dismissed (in the instant case the order reinstating case was signed on September 1, 1972 and the next two subsequent court terms would end on May 13, 1973). Rule 530 provides that any pending action in which no proceeding of record has taken place within a period of eighteen months shall be subject to dismissal (in the instant case the docket entries reflect that no proceeding of record transpired for an eighteen month period prior to the notice of contemplated dismissal being sent). Rule 530(b) also provides that notice of contemplated dismissal be sent to all counsel and that the case be dismissed unless within thirty days the court signs an order, pursuant to Rule 530(c), suspending the operation of the rule. Rule 530(c) provides that the order suspending the operation of the rule "shall prescribe the duration and any other terms of the suspension."

Comparing the two Rules it is clear that both provide that if a case remains inactive for a specific period of time it is to be dismissed unless an order is signed

suspending the operation of the Rules. If an order is signed reinstating the case then Rule 530(c) provides that the trial court can *prescribe the duration of the suspension,* leaving the lower court to set the exact duration of the suspension. All that the provisions of Rule 528L (4) and (6) do is to prescribe the duration of the suspension of Rule 528L of the Supreme Bench of Baltimore City. Thus, there is no conflict between Rule 528L of the Supreme Bench of Baltimore City and Rule 530 of the Maryland Rules of Procedure.

Further, it is clear that Rule 530(c) contemplates automatic dismissal of the case when one of the conditions set out in the order reinstating the case is that it be tried within a certain period, and it is not tried within that period. This is clearly the holding in *Pappalardo v. Lloyd,* 266 Md. 512, 295 A.2d 221 (1972). In this case notice of dismissal under Rule 530 was sent to counsel on April 26, 1971 and on May 25, 1971 an order was signed suspending the operation or Rule 530. The order reinstating the case further provided, "that the operation of Rule 530 will be enforced unless this case is set for trial on or before January 1, 1972." 266 Md., at 514. The case not having been tried by January 1, 1972, the defendants moved that the case be dismissed pursuant to Rule 530 and the motion was granted. In affirming the lower court's decision this Court stated:

> This case was ripe for dismissal and the notice required by the Rule was given April 26, 1971. The Order which suspended the operation of the Rule set forth that the suspension was conditioned upon a specific act to be performed by plaintiffs' counsel. When they failed to comply within the time allowed, the case was in effect dismissed upon the expiration of the time fixed in the Order. The formal Order of Dismissal entered by the court on January 7, 1972 required no further notice and simply reduced to writing what was an accomplished fact. The action of the lower court, therefore, will be affirmed. 266 Md., at 514-5.

Further, in the case of *Chase v. Ja* *nison*, 21 Md. App. 606, 320 A.2d 580 (1974) the Court of Special Appeals found no conflict between Rule 530 of the Maryland Rules of Procedure and Rule 528L of the Supreme Bench of Baltimore City on almost an identical factual pattern as is involved in the instant case.

The Petitioner also alleges that there is a conflict between Rule 527 of the Maryland Rules of Procedure and Rule 528L of the Supreme Bench of Baltimore City. It should be pointed out that Rule 527 of the Maryland Rules of Procedure deals with postponements and continuances and not with dismissals for lack of prosecution. Further, Rule 527 of the Maryland Rules of Procedure does not mandate postponements and in promulgating Rule 528L the Supreme Bench of Baltimore City has decided not to grant postponements under the circumstances which would require automatic dismissal under Rule 528L(4) and (6) of the Supreme Bench of Baltimore City. To hold that under Rule 527 of the Maryland Rules a case can be set for trial after it should be dismissed for lack of prosecution would be directly contrary to this Court's holding in *Pappalardo v. Lloyd, supra,* where this Court stated that when plaintiffs failed to comply with Rule 530 of the Maryland Rules the case was automatically dismissed.

Finally, Petitioner argues that Rule 528L is invalid because it violates her rights to equal protection and due process. In order to make out a claim that Rule 528L violates the equal protection sections of either the State or Federal Constitutions the Petitioner must show that the Rule creates a discriminatory classification. However, Rule 528L of the Supreme Bench of Baltimore City does not have this effect. As has been pointed out, once a case comes within the purview of Rule 528L it must be tried within two terms of the term in which it is reinstated. Rule 530 of the Maryland Rules of Procedure also provides for dismissal within a time limit after the operation of the Rule is suspended. Thus, in all jurisdictions in the State plaintiffs are treated the same. Further, even if Rule 528L does create a discriminatory classification it is on the basis of a geographic

subdivision and such classifications have been upheld. *Salsberg v. Maryland,* 346 U.S. 544 (1954); *Mallett v. North Carolina,* 181 U.S. 1015 (1901); *Chappell Chemical & Fertilizer Co. v. Sulphur Mines Co.,* 172 U.S. 474 (1898); *Missouri v. Lewis,* 101 U.S. 22 (1879). Further, Rule 528L no more deprives Petitioner of due process than the statute of limitations.

WHEREFORE, Respondent prays this Court to deny the Petition for Writ of Certiorari.

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I HEREBY CERTIFY that on this 24th day of July, 1975 a copy of the foregoing Answer of Anthony DeCrescenzo, Incorporated to the Petition for Writ of Certiorari was mailed, postage pre-paid, to Herbert J. Arnold, Esquire, and Richard R. Beauchemin, Esquire, Arnold, Beauchemin & Huber, P.A., 807 W. R. Grace Building, Baltimore, Maryland 21202, attorneys for Petitioner.

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